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No. — 374

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

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MAMPRIL SEQUEIRA PEDREIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the District of New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the dismissal by the United States District Court for the Southern District of New York of an action for a declaratory judgment and injunctive relief to review the validity of a final order of deportation.

OPINION BELOW

The opinion of the District Court is reported in Appendix B, *infra*, pp. 1b–6b. The opinion in the

Court of Appeals is not yet reported; it is reported in Appendix B, *infra*, pp. 7b–13b.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1954 (App. B, *infra*, p. 13b). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether deportation orders issued under the Immigration and Nationality Act of June 27, 1952, are judicially reviewable other than in habeas corpus proceedings.

2. Assuming that actions other than habeas corpus lie, whether the Attorney General or the Commissioner of Immigration and Naturalization is a necessary party to such action.

STATUTES INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, are set forth in Appendix A, *infra*, pp. 1a–9a.

STATEMENT

On March 15, 1954, respondent instituted an action in the District Court for the Southern District of New York for a declaratory judgment to review the legality of final deportation order against him (R. 2–5), naming the District Director

of Immigration and Naturalization for the District of New York as party respondent.[1] The petition alleged that the evidence was insufficient to sustain the deportation order, and that respondent was compelled to testify in violation of his privilege against self-incrimination.

The District Director, on March 25, 1954, moved to dismiss the action on the grounds that the court lacked jurisdiction over the subject matter, that there was lacking an indispensible party to the action, i. e., the Commissioner of Immigration and Naturalization, and that the petition failed to state a claim upon which relief could be granted (R. 7). After hearing, the District Court sustained the motion on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensible party to the suit, and, on that basis, found it unnecessary to reach the issue of whether a declaratory judgment action was precluded by the Immigration and Nationality Act of 1952 (R. 13–17, 19).

On appeal, the Court of Appeals for the Second Circuit reversed the order of the District Court and remanded the cause for further proceedings (R. 28), holding that an action for declaratory relief under Section 10 of the Administrative

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[1] Respondent's petition alleged that jurisdiction was based on the Immigration and Nationality Act of 1952, and on Section 10 of the Administrative Procedure Act (R. 2).

Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, is available to test the legality of the deportation order, that nothing in the Immigration and Nationality Act of 1952 precludes such relief, and that neither the Attorney General nor the Commissioner of Immigration and Naturalization is an indispensible party to the action (R. 22–27).

REASONS FOR GRANTING THE WRIT

The decision below presents a conflict between circuits in two aspects, *i. e.*, (1) whether remedies other than habeas corpus are available to test the legality of a final deportation order, and (2) whether, assuming that they are, the Attorney General or the Commissioner of Immigration and Naturalization is an indispensible party. Both issues are important in the administration of the immigration laws, and should be resolved to avoid confusion and inequality with respect to the remedies now available to aliens.

1. The holding below follows the opinion of the Court of Appeals for the District of Columbia Circuit in *Rubinstein* v. *Brownell*, 206 F. 2d 449, affirmed by an equally divided Court, 346 U. S. 929.[2] It thus presents again the issue, as yet unresolved by a majority decision of this Court, of whether Section 242 of the Immigration and Nationality Act of 1952, *infra*, pp. 1a–6a, affords a

[2] See the Government's Petition for a Writ of Certiorari and Brief, *Ibid.*, No. 300, O. T. 1953.

broader scope of review of final deportation orders than had obtained prior to the 1952 Act when, under the prior statute, habeas corpus was the sole means of judicial review. See *Heikkila* v. *Barber*, 345 U. S. 229.

Since the *Rubinstein* case was before this Court, the Court of Appeals for the First Circuit in *Batista* v. *Nicolls*, 213 F. 2d 20, has flatly refused to follow the majority opinion of the District of Columbia Circuit in that case, either in its holding or in its interpretation of the legislative history of the new Act. It has affirmed the dismissal of three petitions for declaratory and injunctive relief brought against a district director of the Immigration and Naturalization Service. While the *Batista* opinion discusses separate grounds for dismissal, it is unequivocal in its repudiation of the principle of the *Rubinstein* case, in favor of the rationale of *Heikkila* v. *Barber, supra,* which, on the basis of its analysis of the legislative background of the new Act, the First Circuit finds still applicable to restrict judicial review of final deportation orders to the remedy of habeas corpus. Thus, a rule has been established for the First Circuit at variance with that laid down by the District of Columbia Circuit in the *Rubinstein* case,[3] and by the Second Circuit in the instant case.

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[3] See also, *Lim Fong* v. *Brownell*, No. 12264, C. A. D. C., decided July 22, 1954.

As was indicated in the Government's brief in the *Rubinstein* case (No. 300, O. T. 1953), the interpolation into the 1952 Act of an additional procedure, which would inevitably produce long and unnecessary delays in deportation after a final order has issued, is unwarranted. Such a novel departure in the previous method of review is not justified by the statements of one Congressman apparently relied on in the *Rubinstein* opinion. Congress carried forward into the new Act such traditional terms as "final determination of deportability", and "final order of deportation under administrative processes", and made specific reference to the remedy of habeas corpus, and it is very unlikely that it intended to create by implication a new form of judicial scrutiny in addition to habeas corpus which is historically based on the theory of administrative finality. Also, as was indicated in the Government's brief in the *Rubinstein* case (No. 300, O. T. 1953, pp. 18–30), the rejection by both House and Senate of amendments which would have subjected deportation orders to direct review precludes the inference that Congress intended by silence to create such remedy.

The policy considerations mentioned in the opinion below (Appendix B, *infra*, pp. 9b–10b) are matters for legislative judgment, but not a basis for reading the 1952 Act contrary to the Congressional intent. Recognizing the deficiency of the habeas corpus remedy from the standpoint

of the alien, the Attorney General, on March 10, 1954, in identical letters to the Speaker of the House of Representatives and the Vice-President urged the enactment of legislation to permit direct judicial review of deportation orders.[4] He enclosed the draft of a proposed bill

[4] This letter stated in part:

* * * * *

"Historically, the immigration laws of the United States have never provided for judicial review of orders for the deportation of aliens from the United States. However, the courts have permitted such orders to be challenged in habeas corpus proceedings which are available to aliens after they have been taken into custody pursuant to such orders of deportation. In recent years, it has been suggested by judges and lawyers and by officials of this Department that an alien should be able to obtain judicial review of an order for his deportation as soon as it has been issued and without waiting until he has been taken into custody. I concur in this view and believe that the attached legislative proposal will effectively accomplish this desirable change in the law.

"Moreover, there is a present need for clarification on this subject. In 1953, the Court of Appeals for the District of Columbia, in *Rubinstein* v. *Brownell*, 206 F. 2d 449, held that deportation orders issued under the Immigration and Nationality Act of 1952 are reviewable in actions for declaratory judgments as well as in habeas corpus. This decision was affirmed by an equally divided Supreme Court on January 11, 1954, thus leaving the question in doubt. The Declaratory Judgment Act contains no provisions for expediting the determination of cases involving deportation orders, or for reasonably distributing such cases among the Federal courts. Thus, only specific legislation can provide in this area a judicial remedy other than habeas corpus and at the same time deal adequately with such important aspects of review as orderly venue, expedition, and the prevention of repetitious judicial proceedings." [Press Release of the Attorney General of the United States, March 10, 1954.]

which was designed to settle problems of party and venue, expedite the proceedings, and prevent repetitious litigation, so as to avoid the difficulties which arise if review other than by habeas corpus is read into the present statute (see discussion in the Brief for the Government in the *Rubinstein* case, No. 300, O. T. 1953, pp. 39–41). Congress, however, did not enact such legislation and we do not know whether it will do so at its next session or in the immediate future. In the circumstances, it is necessary that the question of remedy unresolved by the *Rubinstein* case be settled by this Court if aliens in all parts of the country are to have equality in the remedies available to them.

2. Having decided that declaratory relief under Section 10 of the Administrative Procedure Act, 50 U. S. C. 1009, is available by virtue of Section 242 (a) of the Immigration and Nationality Act of 1952, the Court of Appeals then held that such action would be against the subordinate District Director of the Immigration and Naturalization Service without joinder of either the Commissioner of Immigration and Naturalization or the Attorney General of the United States. In this ruling, the Court of Appeals established for the Second Circuit a position directly in conflict with various holdings of the Third Circuit (e. g., *Paolo* v. *Garfinkel*, 200 F. 2d 280; *Belizaro* v. *Zimmerman*, 200 F. 2d 282; *Slavik* v. *Miller*, 184 F. 2d

575, certiorari denied, 340 U. S. 955; *Podovinnikoff* v. *Miller*, 179 F. 2d 937, and of the Ninth Circuit (e. g., *Rodriguez* v. *Landon*, 212 F. 2d 508).[3] This conflict between those circuits primarily concerned with immigration and naturalization matters further creates confusion and inequality in the administration of the new Act.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER 1954.

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[3] The Government's position with respect to this issue has been set forth in its briefs in *Heikkila* v. *Barber*, No. 426, O. T. 1952, pp. 14–6, and *Martinez* v. *Neely*, No. 218, O. T. 1952, pp. 46–56.

APPENDICES

APPENDIX A

Statutes Involved

1. The Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1101, *et seq.*, provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing

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in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigra-

tion officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determin-

ing the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained,

released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U. S. C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U. S. C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such

amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

SEC. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations

for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

2. Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power,

privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

United States District Court, Southern District of New York

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT

Appearances: Nemeroff, Jelline, Danzig & Paley, Esqs., Attorneys for Petitioner, 350 Fifth Avenue, New York 1, N. Y. Honorable J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Respondent. Philip M. Drake, Esq., Assistant United States Attorney, of Counsel.

Opinion

DIMOCK, D. J.:

Pedreiro brings this action to review an order of the Board of Immigration Appeals, to declare null and void an order of a hearing officer adopted by the Assistant Commissioner, and to obtain a temporary injunction staying execution of an order of deportation pending final determination of the issues herein. He adds the usual prayer for other and further relief. He cites as author-

ity for his procedure section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. Sec. 1009.

The District Director of Immigration and Naturalization for this District of New York who is the only adverse party named by Pedreiro makes this motion to dismiss on the ground that there is a lack of an indispensable party, namely, the Commissioner of Immigration and Naturalization, and upon the further ground that habeas corpus is the exclusive means for reviewing deportation orders.

Taking up the question of nonjoinder of parties let us see just what Pedreiro's situation is. He alleges that, after the issuance of a warrant of arrest, a deportation hearing was conducted on December 4, 1951, before a hearing officer of the Immigration and Naturalization Service at New York City; that the Hearing Officer, on December 4, 1951, rendered a decision and made an order directing that he be deported on the charges stated in the warrant of arrest; that exceptions to the Hearing Officer's decision and order were duly filed, and on or about May 5, 1952, the Assistant Commissioner, Adjudication Division, adopted the order; that he appealed to the Board of Immigration Appeals but the Board, on or about June 24, 1953, ordered the appeal dismissed and that two subsequent motions to the Board to reopen the hearings were made and denied.

The charges in the warrant of arrest are not stated.

Without further specification, the order of deportation is attacked on the ground that the "evidence adduced at said hearing was in contraven-

tion of the Constitution of the United States and the Fifth Amendment in that" he "was deprived of due process of law and in that" he "was compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States."

It was held in *Vaz v. Shaughnessy*, D. C. S. D. N. Y., 117 F. Supp. 778, aff'd., 2 Cir. 208 F. 2d 70, that the Commissioner of Immigration and Naturalization and/or the Attorney General were indispensable parties to a proceeding brought under section 10 of the Administrative Procedure Act for (1) a declaratory judgment that the applicant was eligible for suspension of deportation, (2) an injunction against the District Director of Immigration and Naturalization and (3) a direction that the District Director reopen the deportation hearing for the purpose of permitting an application for suspension of deportation. In that case the alien's application had been considered and denied by a hearing officer, the Assistant Commissioner of Immigration and Naturalization and the Board of Immigration Appeals. It was there held that, to grant the relief sought and to effectively dispose of the controversy, the court would have to have jurisdiction over the superior officer. It was said that the court there could not, without the presence of the superior officer, grant all the relief that the plaintiff sought. Indeed no effective relief could have been given. The only effective relief would be that which would protect the alien in other Districts and that could not be obtained

without getting jurisdiction over the superior officer.

In a proceeding to review a deportation order like the one at bar it is still clearer that the superior officer is a necessary party. Indeed before the *Vaz* case there were many which held that the Commissioner of Immigration and Naturalization was an indispensable party in actions to review orders of deportation. *Paolo* v. *Garfinkel*, 3 Cir., 200 F. 2d 280. *Slavik* v. *Miller*, 3 Cir., 184 F. 2d 575, cert. denied, 340 U. S. 955. *Pedoeimikoff* v. *Miller*, 3 Cir., 179 F. 2d 937. *Medalie* v. *Shaughnessy*, D. C. S. D. N. Y., 102 F. Supp. 950. *Bivas* v. *Commissioner of Immigration and Naturalization*, D. C. N. D. Ohio, 103 F. Supp. 180. See *Connor* v. *Miller*, 2 Cir., 178 F. 2d 755.

Here, however, Pedreiro says that his case is different; that he proceeds on constitutional ground and that the District Director proposes to deport him without warrant in law. Under those circumstances, he says, he need not join any one else in his suit to prevent that deportation. It may be true that Pedreiro has a remedy against the District Director all alone but if so that remedy is habeas corpus. If he persists in proceeding under the Administrative Procedure Act he presents a case no more favorable for elimination of superior officers than the *Vaz* case. The relief he seeks includes a review of the action of the Board of Immigration Appeals. A direct review of that action is impossible without the presence of the Attorney General or the Com-

missioner of Immigration and Naturalization. Even if Pedreiro would be satisfied to let the order of the Board stand and rely on a declaration that it was invalid as between him and the District Director, that declaration would be ineffective against the superior officers. *Marshall v. Crotty*, 1 Cir., 185 F. 2d 622, 627-628. The only effective relief would be that which would protect him in other Districts and that could not be obtained without getting jurisdiction over the superior officers. Even if the determination were that the order was not merely improper but indeed unconstitutional and utterly void, that determination would impart to the order no magic through which its sentence could reach out and bind persons who were not before the court.

All of the foregoing discussion has proceeded upon the assumption that the remedy chosen by Pedreiro is available for review of deportation orders. Since I conclude that, even if it is available for that purpose, it must be denied for lack of a necessary party, I can, as did the Court of Appeals in the *Vaz* case, dispose of the matter without passing on the question whether the remedy is available. It is noteworthy, however, that since the Court of Appeals decision in the *Vaz* case, the United States Supreme Court has, by an evenly divided court, affirmed a decision of the District of Columbia Court of Appeals holding that the Nationality Act of 1952 makes the remedy under the Administrative Procedure Act available in deportation order cases. *Rubinstein*

v. *Brownell*, 206 F. 2d 449, aff'd sub nom. *Brownell* v. *Rubinstein*, 346 U. S. 929.

Since the instant case must be dismissed, Pedreiro's motions for a stay and for enlargement on bond fall with the dismissal and are denied without further consideration.

Dated: April 8, 1954.

E. J. DIMOCK,
United States District Court.

United States District Court, Southern District of New York

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT

The respondent's motion for an order dismissing the above entitled action on the ground that there is a lack of an indispensable party in this proceeding having been noticed for hearing and heard on March 30, 1954. The plaintiff appearing by M. Silfen, Esq., and the respondent appearing by J. Edward Lumbard, United States Attorney for the Southern District of New York (by Philip M. Drake, Assistant United States Attorney) and the Court having rendered its written opinion, filed on April 9, 1954, it is

Ordered that the said motion be and the same is hereby granted in all respects, together with costs

as taxed in the sum of $20.00, and that the respondent have judgment against Mampril Sequeira Pedreiro herein.

Dated: New York, N. Y., April 23rd, 1954.

E. J. DIMOCK,
U. S. D. J.

Judgment entered April 26, 1954.

WILLIAM T. CONNELL,
Clerk, U. S. District Court.

United States Court of Appeals for the Second Circuit

No. 276—OCTOBER TERM, 1953

(Argued May 4, 1954. Decided July 1, 1954)

Docket No. 23091

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER-APPELLANT

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT-APPELLEE

Before CLARK, FRANK and MEDINA, *Circuit Judges*

Petitioner appeals from an order dismissing the case for lack of an indispensable party. Dimock, D. J. Reversed.

Nemeroff, Jelline, Danzig & Paley, Attorneys for Petitioner-Appellant; Aaron L. Danzig, of Counsel. J. Edward Lumbard, United States

Attorney for the Southern District of New York, Attorney for Respondent-Appellee; Philip M. Drake and Lester Friedman, of Counsel.

MEDINA, *Circuit Judge:*

This is an action by a deportee for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U. S. C. Sec. 1009. Petitioner having exhausted his administrative remedies seeks a review of the proceedings resulting in a final order of deportation, claiming that his constitutional rights have been violated in that "the evidence adduced * * * was in contravention of * * * the Fifth Amendment in that your petitioner was deprived of due process of law and in that your petitioner was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purposes in coming to the United States."

The merits have not been considered, the court below having dismissed the case on motion pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, as the action was brought against the District Director of Immigration and Naturalization for the District of New York, without joining either the Attorney General or the Commissioner of Immigration and Naturalization.

To those who have spent the greater part of their professional lives manipulating procedural devices in the ebb and flow of practice at the bar it sometimes seems that in the very areas of the law where simplicity and flexibility of procedure are most indispensable are found a morass of complexities. This case provides an illustration.

The aliens involved in deportation proceedings are often in poor financial circumstances; the validity of final orders of deportation generally, if not always, depends upon questions relating to the alleged infringement of the deportees' constitutional rights; their imprisonment or enlargement on bail and the actual deportation itself affect human relationships of the highest consequence. Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings against the deportee have conformed to the requirements of due process.

And yet a careful perusal of the numerous decided cases referred to in Judge Dimock's scholarly and reasoned opinion, and certain other authorities cited in the briefs submitted by counsel for the parties, discloses refinements and conflicting views which make it a difficult task to find and apply controlling principles. The traditional remedy of habeas corpus as a means of reviewing the validity of an order of deportation is plainly inapplicable, as petitioner is not in custody, and one cannot blame him for unwillingness to gamble with his liberty which may not readily be regained. While counsel for respondent contend that the question is still open, whether or not a civil action for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, *supra*, provides an alternative

method for testing the validity of a deportation order, we shall follow *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C., 1953), affirmed sub nom. *Brownell* v. *Rubinstein*, 346 U. S. 929 (1954). See *contra*, *Batista* v. *Nicolis*, —— F. 2d ——, decided by the Court of Appeals for the First Circuit on May 19, 1954.

Many decisions support the view that the Attorney General, or the Commissioner of Immigration and Naturalization, is an indispensable party,[1] but the holding by this Court in *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2, 1953), seems distinguishable, as the *Vaz* case involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter, whereas here petitioner seeks a review of the record on which is based a final order of deportation, on the ground that his constitutional rights have been infringed. The District Director, moreover, especially under the new regulations promulgated on December 17, 1952,[2] plainly is the

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[1] *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Slavik* v. *Miller*, 184 F. 2d 575 (C. A. 3, 1950), certiorari denied, 340 U. S. 955 (1951); *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3, 1952); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C. A. 3, 1952); *Rodiguez* v. *Landon*, 112 F. 2d 508 (C. A. 9, 1954); *Medalha* v. *Shaughnessy*, 102 F. Supp. 950 (D. C. S. D. N. Y., 1951); *Birns* v. *Commissioner*, 103 F. Supp. 180 (D. C. N. D. Ohio, E. D., 1952); *Corona* v. *Landon*, 111 F. Supp. 191 (D. C. S. D. Cal., C. D., 1953).

[2] These regulations were made effective after the date of the filing of the complaint in the *Vaz* case, *supra*, and read as follows:

"Part 243—Deportation of Aliens in the United States.

person to whom has been delegated the power to issue the warrant of deportation and determine the various questions incidental thereto.

The rationale of the cases holding the Commissioner of Immigration and Naturalization or the Attorney General to be an indispensable party in such cases as this boils down to the assertion that the deportee might move to another district and be taken into custody by the District Director there, and the injunction granted in the pending suit would not bar deportation from such other district. In this sense the remedy would be incomplete and there would be no guaranty against circuity of action and delay.

Viewed realistically, however, and with due respect to our brethren of the Third Circuit and others, we think these considerations lack substance. The likelihood of removal to another district seems remote, especially as the principal

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"SEC. 243.1. Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien—(a) Issuance. In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation.

"(b) Determination of place and cost of deportation, and necessity for attendants. District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

"SEC. 243.2. Finality of decision. No appeal shall lie from the decision of the district director in the exercise of the authority described in Sec. 243.1."

reason for these numerous proceedings against District Directors, disclosed by the reported cases above referred to, appears to be that the joinder of the Commissioner of Immigration and Naturalization or the Attorney General, whose actual and official residences are in the District of Columbia, would require the venue to be laid in Washington and involve expense which the deportee may be and often is unable to defray. See dictum of Picard, *J.*, in *Ragni* v. *Butterfield*, 115 F. Supp. 953 (D. C. E. D. Mich., 1953). Doubtless the defense would be conducted by the same or equally competent counsel; the same review of the record by appellate courts would be available; and such further proceedings as might be directed to be had would follow in due course. To require the joinder of the Commissioner of Immigration and Naturalization or the Attorney General under these circumstances would, we think, sacrifice substance to mere form and serve no other purpose than perhaps to deny all relief short of habeas corpus to an indigent alien deportee, whose constitutional rights are just as sacred in the eyes of the law as those of a citizen.

If it shall ultimately be found that petitioner is entitled to injunctive relief against the District Director, we believe such relief, even if not as comprehensive as it could be if the Attorney General had been joined, will not only furnish the protection which petitioner solicits and which will afford him adequate protection, but will follow traditional lines, as our courts have always been zealous to prevent public officials from restraining or threatening to restrain the liberty of citizens

and aliens alike, in violation of their constitutional rights. This result seems to us to be in harmony with the reasoning of *Williams* v. *Fanning*, 332 U. S. 490 (1947).

The case is remanded to the District Court for further proceedings in accord with this opinion, including consideration of the motions referred to in the opinion below.

Reversed.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of July one thousand nine hundred and fifty-four.

Present: Hon. Charles E. Clark, Hon. Jerome N. Frank, Hon. Harold R. Medina, Circuit Judges.

MAMPRIL SEQUEIRA PEDREIRO, PETITIONER-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S) A. DANIEL FUSARO, *Clerk.*

Judgment filed July 1, 1954.

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